Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

PATRICIA A. TURNER, - - - - *Petitioner,*

versus

RICHARD A. FREY, JR., Et Al., - - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the evidence present disputed issues of material fact?

2. Has the Plaintiff alleged physical abuse?

3. Did the trial court improperly assign the burden of proof?

4. Can a single incident or occurrence show a custom or practice?

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998
No. _____

Patricia A. Turner, Petitioner
v.
Richard A. Frey, Jr., et al., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Patricia A. Turner, the Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on October 29, 1998.

OPINION BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit (Appendix B) was entered on October 29, 1998.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254. The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 29, 1998. (See Appendix B) The Order denying Plaintiff's motion for reconsideration was entered on June 3, 1997. (See Appendix C) The Memorandum Opinion and Order was entered February 27, 1997. (See Appendix D)

PARTIES

Patricia A. Turner, Administratrix of the Estate of Stanley R. Shepherd, Plaintiff.

Richard A. Frey, Jr.; Donald Copple; Derek Browning; Ezell Smith; Harold Adams; Michael Durham; Dale Cornatzer; Metropolitan Department of Corrections; Darryl T. Owens; Chris Gorman; Irvin G. Maze; David L. Armstrong, Jr.; Jefferson County Fiscal Court; and Doe Defendants, Respondents

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STATEMENT OF THE CASE

This case arises out of a Complaint filed by the Petitioner, Patricia A. Turner as Administratrix of the Estate of Stanley R. Shepherd, in the United States District Court for the Western District of Kentucky, Louisville Division, on August 15, 1991, pursuant to 42 U.S.C. § 1983, seeking monetary damages for the wrongful death of the decedent.

On September 4, 1991 and September 5, 1991, Respondents filed their Answer. On December 4, 1996, Respondents filed a Motion for Summary Judgment. The Court granted Respondents' Motion for Summary Judgment by a Memorandum Opinion and Order dated February 27, 1997; *see*, Appendix D.

Petitioner filed a timely appeal with the United States Court of Appeals for the Sixth Circuit, which denied the appeal

by Order dated October 29, 1998; *see*, Appendix B. This Petition followed.

Stanley Shepherd was arrested on August 17, 1990 at 4:45 p.m. by the Louisville Police and charged with the theft of merchandise valued at $2.10. Because he was unable to post bond, Shepherd was incarcerated overnight at the Jefferson County Jail.

For reasons which are not entirely clear, jail personnel "four-pointed" Shepherd; i.e., handcuffed Shepherd to his bunk in a supine position (on his back). At some point during the night, he developed a nosebleed. The reasons for Shepherd's nosebleed were never satisfactorily resolved. Respondents claimed that Shepherd had been "picking his nose." Petitioner alleged, based on the available evidence, that jail guards had caused the nosebleed by striking Shepherd in the face.

When jail guards came to take Shepherd to jail the following morning, they found him dead, having apparently choked to death on his own blood and vomitus.

REASONS FOR GRANTING THE WRIT

I. PLAINTIFF HAS ALLEGED PHYSICAL ABUSE.

The trial Judge, Honorable John Dixon summarily dismissed Plaintiff's allegations of physical abuse in a single footnote. Judge Dixon declined to consider the allegations of physical abuse because, in his view, the Complaint did not adequately allege this theory of recovery. The Sixth Circuit summarily dismissed this argument with the comment that it was "irrelevant." Opinion at 8-9.

Judge Dixon and the Sixth Circuit are mistaken for three reasons. First, the Plaintiff has reasonably alleged physical abuse. Plaintiff alleged in ¶ 15 of her Complaint:

> The actions of the Defendants resulted in the unnecessary and wanton infliction of pain upon Stanley Shepherd prior to his death.

In testing the sufficiency of a complaint, the complaint must be liberally construed in favor of the pleader, and with every intendment in his favor. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Under this liberal standard, the foregoing language may

reasonably be construed as alleging the physical abuse of the decedent.

Second, assuming *arguendo* that Plaintiff failed to sufficiently allege physical abuse, she should have been granted leave to amend her pleading, to conform to the proof. Rule 15(a), F.R.C.P. (leave to amend shall be freely given when justice so requires). A plaintiff is not bound by the theory of his pleading; he may offer his proof and conform his pleadings to the proof offered when presentation of the merits of his action will be subserved thereby. *Newman v. Zinn,* 164 F.2d 558 (3d Cir. 1947); Wright, Miller & Kane, Fed. Prac. & Proc. § 2722 at n.5 (1983).

Third, the court should not have limited the Plaintiff to the theories of recovery set out in her Complaint.

The pleadings need only identify the basis of the court's jurisdiction, demand for judgment for the relief sought and contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8, F.R.C.P.

The pleadings need not identify any particular legal theory under which recovery is sought. *Crull v. GEM Ins. Co.*, 58 F.3d 1386, 1391 (9th Cir. 1995).

A similar rule must govern the case at bar. The evidence in the instant case clearly raises disputed issues of material fact. Plaintiff should not lose her cause of action merely because her attorneys failed to set out one theory of recovery with sufficient particularity.

II. THERE ARE DISPUTED ISSUES OF MATERIAL FACT.

Summary judgment was not warranted in the instant case because there were many disputed issues of material fact. Summary judgment is only appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 246 (1986).

The Sixth Circuit opined that Plaintiff has "fail[ed] to present facts which would give rise to the 'deliberate indifference' required of prison officials. Opinion at 5. Respectfully, Petitioner insists that the Sixth Circuit is mistaken.

ASSAULT AND BATTERY

In the case at bar, a rational trier of fact obviously could have found for the plaintiff. A jury could reasonably have concluded that Stanley Shepherd was assaulted and battered. The bruises on Shepherd's nose were noted by the coroner four hours after death. Similarly, a paramedic at 8:49 a.m. on the morning of death observed these bruises, and immediately concluded that they had been caused by some direct trauma. The Chief Medical Examiner in Jefferson County, Dr. L. C. McCloud, stated that the probable etiology of the bruise was a blow to the nose. To overcome a summary judgment motion only requires that there be a reasonable possibility that the wound was caused by a blow. *See, Boretti v. Wiscomb*, 930 F. 2d 1150 (6th Cir. 1991).

The credibility of witnesses is extremely important in resolving contested issues of fact. In the instant case, a number of witnesses claimed that the decedent's nose bleed had been caused by Shepherd's picking his nose (*see* Norine Ahart, etc.). Other witnesses, however, claimed that Shepherd's injuries had resulted from a fall (*see* Harold Adams). A trier of fact could reasonably have concluded that the explanation of "picking the nose" was a *post hoc* attempt to conceal what had actually occurred; the witnesses' credibility, therefore, was extremely important.

FAILURE TO MONITOR

A reasonable jury might also have concluded that Shepherd was not properly monitored and that he had in fact been effectively ignored in his *extremis*, as evidenced by the *dried* vomitus found in his hair by the EMS technician. A jury might reasonably have concluded that the Defendants had been clearly indifferent to Shepherd.

POSITION OF THE BODY

In deposing Dr. L.C. McCloud, Respondent's counsel established that some of the physical evidence indicated Shepherd had been four pointed face-first. Whether Shepherd was placed face-up or face-down could well have been determinative, under the deliberate indifference standard of the Eighth Amendment. Face-down would not have created the substantial risk that was created by four-pointing in the supine position. Although several witnesses indicated that Shepherd was four pointed on his back, this critical discrepancy was never satisfactorily explained.

CRUEL AND UNUSUAL PUNISHMENT

It is well settled that the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment and is forbidden by the Eighth Amendment. *Hudson v. McMillan*, 112 S. Ct. 995, 998 (1992). The core inquiry is whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously or sadistically to cause harm. *Id.* at

999.

Much of the factual evidence indicates an assault and battery. This includes both the physical evidence and the testimony of medical experts. Dr. McCloud stated that Shepherd probably did receive trauma to his nose, and that his injuries were medically consistent with a blow to the face. Paramedic Schiess agreed with this assessment. Whether such a blow was actually inflicted by the Defendants is a disputed issue of material fact.

DELIBERATE INDIFFERENCE

In *Estelle v. Gamble*, 429 U.S. 97 (1976), this Court held that certain "elementary principles" establish the "government's obligation to provide medical care for those whom it is punishing by incarceration." The Eighth Amendment's proscription of cruel and unusual punishment prohibits prison authorities from displaying deliberate indifference to serious medical needs, because such indifference constitutes the unnecessary and wanton infliction of pain.

McKinney v. Compton, 888 F. Supp. 75 (W.D. Tenn. 1995). A pretrial detainee may not enjoy the protections of the Eighth Amendment, *Barber v. City of Salem*, 953 F. 2d 232, 235 (6th Cir. 1992), but the Due Process clause of the Fourteenth Amendment affords them protections analogous to the Eighth Amendment rights of prisoners. *Roberts v. City of Troy*, 773 F. 2d 720, 723 (6th Cir. 1985). Although Shepherd was a pretrial detainee and thus was not being punished, Jefferson County still had the same obligations; in fact, it may have had even greater obligations to a pretrial detainee; *see, Taylor v. Stenet*, 532 F. 2d 462 (5th Cir. 1976).

A person who is in confinement obviously must rely upon the authorities to treat his medical needs. As this Court noted, "if the authorities fail to do so, those needs will not be met." *Estelle.* The *Estelle* court concluded that deliberate indifference to serious medical needs constitutes the "unnecessary and wanton infliction of pain." It added:

[t]his is true whether the indifference is manifested by

> prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care.

Id. at 104.

The Sixth Circuit held that:

> "there is no reason to think that the guards were indifferent to the serious medical needs of the prisoner as required by *Estelle v. Gamble*."

Opinion at 6-7. Again, the Sixth Circuit has misread the holding on which it relies.

A claim is properly stated when a prisoner alleges acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. *Id.* In the instant case, a jury could have reasonably concluded that finding a prisoner in an unexplained pool of blood, with his nose packed, and four pointed in a supine position, indicated deliberate indifference to serious medical needs, if the Defendants were aware of the danger. The evidence in this case clearly shows that all of the prison officers involved were well aware of the danger.

Furthermore, there was ample evidence that Stanley Shepherd had attempted to obtain assistance, and that his cries for help were ignored by both the guards and the medical staff. A number of inmates who were interviewed as part of the Corpse Investigation stated that they had heard Stanley Shepherd rattling his chains for a long period of time.

A reasonable jury could have concluded that the defendants ought to have realized that this was a desperate plea for help. If a risk is so obvious that a reasonable man would be bound to realize it, jurors may infer that the defendants did, in fact, realize the danger. *Farmer v. Brenhan*, 114 S. Ct. 1970, 1981 (1994). An official is deliberately indifferent when he knows of an excessive risk to a detainee's health or safety and disregards it. *Id.* Moreover, qualified immunity does not allow officers to ignore such health needs. A reasonable jail guard should clearly realize the danger of chaining a prisoner who is bleeding from the nose, on his back. A reasonable jail guard should also realize the danger of ignoring a prisoner's plea for

help, especially when the jail has an obligation to provide the inmate with medical care. *See Estelle.*

THE FOUR POINT POLICY

42 U.S.C.A. §1983 imposes liability on any person who deprives another of his federally protected rights. Jefferson County and its jailer, Richard Frey, Jr., are liable if the execution of a county policy or custom - whether promulgated by its law-makers or by those whose edicts or acts may fairly be said to represent official policy - inflicts an injury that deprives another of his federally protected rights. *Monell v. New York Department of Social Services*, 436 U.S. 658 (1978).

Jefferson County and Frey have adopted a policy and custom concerning the four pointing of prisoners. The policy, numbered Policy 10.20, states that:

> [t]he officer must exercise good judgment in handcuffing and restraining prisoners. When and by what means an inmate should be restrained is left to the officer since he is in the best position to judge what measures are necessary to control the inmate. The officer can be held for gross negligence if he/she fails to exercise good judgment....Handcuffing and

> restraining are specialized and technical skills that are best acquired through practical application and experience.

While Policy 10.20 concerns the application of restraint generally, Standard Operating Procedure §300.57 concerns four point restraints in particular. It states:

> 3. The inmate will be placed on the bunk in a prone position on his stomach, with his head toward the foot of the bunk.

These policies are obviously drafted in a gross and reckless manner, since injury to a patient bleeding nasally is readily foreseeable. The officers should have been aware of the extreme danger in four pointing a profusely bleeding prisoner; however, the county should have foreseen and averted this problem. When a county implements or executes a policy or custom which it either knows or should have known violates the constitutional rights of citizens, the county is liable under §1983, and its action is akin to gross *negligence*. *Hays v. Jefferson County, Kentucky*, 668 F. 2d 869, 874 (6th Cir. 1982).

The Sixth Circuit summarily dismissed this argument

with the terse comment that medical personnel had requested that Shepherd be four-pointed. This assertion completely ignores the dispositive fact that jail guards should not have four-pointed Shepherd on his back.

CONCEALMENT OF EVIDENCE

If Shepherd were, in fact, clothed at 6:48 a.m. (as the County has alleged), his clothes had obviously been removed before the paramedics arrived. A jury could reasonably have concluded his clothes were removed to conceal the quantity of blood released. If the jail guards found that Shepherd's gown were completely blood-soaked, and still refused to help him, this would certainly be strong evidence of their indifference. Shepherd could not have removed the gown himself, because Nurse Swindler testified that at 8:45 a.m. she saw Shepherd with both his hands and feet cuffed and that he was completely nude. These factual questions should have been resolved by a jury.

Nurse Swindler provided further evidence that indicates

the removal and concealment of substantial blood from the person of Shepherd. She testified that at 8:45 a.m. Shepherd was "clean all over" and that he had no blood at all on his body. Not more than ten minutes later, however, Deborah Schiess saw something completely different: she saw bloody vomitus on Shepherd's neck and in his hair, along with dried blood on both his right and left anterior shoulders. The credibility of these witnesses was an essential question in resolving this case.

III. THE COURT IMPROPERLY ASSIGNED THE BURDEN OF PROOF.

Judge Dixon evidently agreed that there are still disputed issues of material fact. He believed, however, that the Plaintiff still could not prevail, for two reasons: (1) because Plaintiff had not met her burden of proof, and (2) because Plaintiff had only alleged a single incident of misconduct. Judge Dixon is mistaken both counts.

First, Plaintiff contended that the County had implemented an unconstitutional policy and that it had failed to

adequately train its corrections officers. The Court below improperly assigned the burden of proof on these issues to the Plaintiff. Judge Dixon stated:

> Further, defendants (sic) have demonstrated a lack of evidence to support plaintiff's contention that defendant Frey failed to properly set policy and failed to supervise or train the corrections officers and medical personnel... The burden passed to plaintiff to establish the existence of a disputed fact essential to these issues. However, plaintiff failed to demonstrate the existence of a disputed fact on these issues.

Opinion at 20-21.

Respectfully, Plaintiff insists that such is simply not the law, and that the trial Court misconceived the law on this point. As this Court will note, Judge Dixon required the Plaintiff to prove the existence of a negative, namely, that the County did not adequately train and supervise its corrections employees. Moreover, the evidence on this point was necessarily within the sole control of the Defendants, and not available to the Plaintiff. Under such circumstances, the burden of proof shifts to the party having control of all the evidence.

As the treatise Corpus Juris Secundum explains this rule:

> The party whose contention requires proof of a negative fact generally has the burden of evidence to prove that fact, except as the rule may be modified by the fact... that the evidence as to such issue is peculiarly within the adverse party's knowledge or control...
>
> Ordinarily, a party does not have the burden of establishing facts peculiarly within the knowledge of his adversary.
>
> In the administration of justice, it is desirable that the burden of proof and the burden of producing evidence be placed on the party best able to sustain it, and there is authority for the view that the burden of proof and the burden of evidence as to an issue rests on the party having the greater means of knowledge. A narrower formulation is that where the evidence as to an issue is peculiarly within the knowledge and control of a party, the burden of proof or the burden of evidence as to such issue rests on him.
>
> It is very generally held that, where the party who has not the general burden of proof possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called on to negative, or has peculiar knowledge or control of evidence as to such matters, the burden rests on him to produce the evidence, the negative averment being taken as true unless disproved by the party having such knowledge or control.

31A C.J.S. *Evidence* §127 at n. 27, §129 at nn. 49-54 (1996).

As authority on this point, the treatise authors cited (among others) *Campbell v. U.S.*, 365 U.S. 85 (1961)(per Brennan, J), in which this Court stated:

> ...the ordinary rule, based on the considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.

Campbell, 365 U.S. at 96.

In support of this assertion, Justice Brennan cited his earlier holding *United States v. New York, New Haven and Hartford Railroad Co.*, 355 U.S. 253 (1957):

> Such information is peculiarly within the knowledge of the Plaintiff. The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.

U.S. v. N.Y., N.H. and H.R. Co., 355 U.S. at 256 n. 5.

In support of this statement, Justice Brennan cited the Court's earlier holding *United States v. Denver and Rio Grande Railroad Co.*, 191 U.S. 84 (1903) and *Selma, Rome and Dalton Railroad Co.*, 139 U.S. 560 (1887).

Other cases so holding include *Runkle v. Burnham*, 153 U.S. 216, 228 (1894); *Graves v. U.S.*, 150 U.S. 118, 123-25 (1893); *Greenleaf v. Birth*, 31 U.S. 292, 312 (per Story, J.), 315(Marshall, C.J., dissenting) (1832).

Applying this rule to the case at bar, it is obvious that the Plaintiff, in order to establish her case, must prove a negative fact, namely, that Jefferson County did not properly train and supervise its corrections employees. It is equally clear that the evidence needed to prove or disprove this contention lies wholly within the control of the Defendants.

Requiring the Plaintiff to prove the negative - that the County failed to properly train and supervise - casts upon her an impossible burden. The County, on the other hand, could readily have come forward with proof that the converse was true - if such proof, in fact, existed. In cases such as this, assigning the burden of proof to the plaintiff is tantamount to a rule that the municipality shall always prevail in §1983 actions. Such was surely not the Congressional intent.

Under the foregoing rule, therefore, the burden of proof shifts to the County, which has the means of proof within its sole possession. Judge Dixon, however, did not so apply the law. He held, rather, that the burden of proof lay with the Plaintiff. Since she did not prove her negative averment (because her adversary controlled the sole means of doing so), Judge Dixon granted summary judgment against her.

The Sixth Circuit, for its part, completely ignored this issue, although it was properly presented in Petitioner's Brief. Such was reversible error, and this Court must so hold.

IV. A SINGLE INCIDENT CAN SHOW A PRACTICE OR CUSTOM.

Furthermore, Judge Dixon erroneously held that a single incident is not sufficient to establish a municipal policy or custom. Opinion, at 23. for its part, the Sixth Circuit dismissed this argument with the offhand comment that "it would be a stretch to believe that there was a policy or custom of deliberate indifference." In so holding, that court ignored a large body of

evidence to the contrary.

In its opinion, the trial court relied primarily on *Strauss v. Chicago*, 760 F. 2d 765 (7th Cir. 1985). *Strauss* is readily distinguishable, since that case arose on facts vastly different from those of the instant action.

As this Court will note, *Strauss* had alleged only that a police officer had struck him in the face. This is vastly different from chaining an obviously sick prisoner down, and allowing him to choke to death on his own blood and vomitus. Moreover, the *Strauss* court itself stated that if a single act is "sufficiently egregious," then that injury alone will show an established custom or policy. *Strauss*, 760 F. Supp. at 769.

It is difficult to imagine conduct more egregious than that alleged in the instant Complaint. In our enlightened age which has proscribed torture, death is the ultimate sanction which may be imposed. Even then, the state may not execute a prisoner by rendering him powerless and allowing him to slowly choke to death on his own blood and vomitus. Yet this is the

penalty which Jefferson County inflicted on Stanley Shepherd for the alleged theft of $2.10 worth of merchandise, a crime of which he stood unconvicted.

Other courts have required much less to establish gross negligence. The New York court inferred gross negligence from the fact that *Ruperto* was not provided with food and water, or a mattress, for two and a half days. *Hodge, supra*, 739 F. Supp. at 879. These deprivations, while uncomfortable, were far less than fatal. Plaintiff reiterates, if the County's treatment of Stanley Shepherd was not sufficiently egregious to constitute neglect and indifference, it appears extremely doubtful that any police misconduct could ever rise to that level.

Moreover, other courts have uniformly held that a single incident of withholding medical treatment establishes a policy or custom. *Anderson v. Atlanta*, 778 F. 2d 678 (11th Cir. 1985); *Herrera v. Valentine*, 653 F. 2d 1220 (8th Cir. 1981); *Hill v. Marinelli*, 555 F. Supp. 413 (N.D. Ill. 1982); *Ancata v. Prison Health Services, Inc.*, 769 F. 2d 700 (11th Cir. 1985) (county

liable for inadequate medical treatment provided to prisoner by private contractor); *Gant v. Aliquippa Borough*, 612 F. Supp. 1139 (W.D. Pa. 1985); *Rymer v. Davis*, 775 F. 2d 756 (6th Cir. 1985) (construing Kentucky law); *Garcia v. Salt Lake County*, 768 F. 2d 303 (10th Cir. 1985).

Extensive research has not disclosed a single reported case in which the death of a prisoner due to inadequate medical treatment failed to satisfy the requirement of deliberate indifference and thus to impose municipal liability for an isolated incident.

One of the circumstances in which sufficient additional evidence has been found to impose municipal liability is when the single incident involves a number of municipal employees. This tends to show, of course, that all of the employees involved so understood the municipal policy or custom. *Kibbe v. City of Springfield*, 777 F. 2d at 806; 1 J. Cook and J. Sobieski, Civil Rights Actions, ¶2.05[B][7] at n. 176 (1996).

Another circumstance from which such additional

evidence may be found is where there are no reprimands, no discharges, no admissions of error. Such post-incident indifference is highly significant.

> If (an) episode of such dangerous recklessness obtained so little attention and action by the City policymaker, the jury was entitled to conclude that it was accepted as the way things are done and have been done in the City of Borger. If prior policy had been violated, we would expect to see a different reaction. If what the officers did and failed to do... was not acceptable to the police chief, changes would have been made.
>
> This reaction to so gross an abuse (of the Plaintiff's rights) says more about the existing disposition of the City's policymaker than would a dozen (similar) incidents...

Grandstaff, 767 F. 2d at 171; *see Bordanero, supra*, 871 F. 2d at 1166-67; *Larez v. City of Los Angeles*, 946 F. 2d 630 (9th Cir. 1991); *Foley, Hegarty, supra*; 1 J. Cook and J. Sobieski, *supra* at ¶2.05 [B][7] n. 177.

Applying these rules to the case at bar, it is clear that the instant action falls squarely within their coverage. Plaintiff has alleged, not "a single isolated incident," but a series of incidents

extending over at least fourteen hours, which culminated in the wrongful death of Stanley Shepherd. Those incidents involved a number of corrections personnel, including Officer Ezell Smith, Officer Zeke Cannon, Sgt. Donald Copple, Officer Derek Browning, Officer Mike Durham, Officer Harold Adams, Sgt. Ed Johnson and Officer Cornatzer. The fact that all of these officers followed identical procedures over the space of fourteen hours tends to show that there was, in fact, a municipal policy or custom which was well-recognized by all of these corrections officers.

Moreover, there have been no "reprimands, discharges, or admissions of error." Indeed, the Defendants with one voice continue to insist that they have done nothing wrong. Opinion at 9 - 11 Judge Dixon stated that there was no evidence that the County and Director Frey "either condoned, encouraged or knowingly acquiesced in" the conduct of their employees. Respectfully, Plaintiff insists that the evidence of such knowing acquiescence is both clear and plentiful. The County's post-

event callousness speaks volumes, and "says far more about the existing disposition of the County's policymakers than would a dozen similar incidents."

Judge Dixon held that "a single isolated incident," no matter how egregious, cannot form he basis of municipal liability; indeed, it does not even entitle the Plaintiff to a jury trial. Respectfully, Plaintiff inquires, where then is the threshold? How many prisoners must die unconvicted for the supposed theft of $2.10?

Will the County be liable for the second death? The fifth? The tenth? Surely this cannot be the correct rule. "The City's citizens do not have to endure a 'pattern' of police misconduct before they can sue the City under §1983." *Leite v. City of Providence*, 463 F. Supp. 585, 590 (D. R.I. 1978).

The County is fairly considered to have actual or imputed knowledge of the almost inevitable consequences of its corrections policies. Granted, that officers Copple, Browning, Durham, Adams, Cornatzer and Smith were not trained medical

personnel, and that they should not ordinarily second guess the medical staff. Still it did not require medical training for these officers to realize that a prisoner lying on his back, helpless, vomiting and bleeding profusely from the nose, would probably choke to death.

Respondents have argued, and the Sixth Circuit implicitly held, that only the medical staff caused Stanley Shepherd's death. Petitioner replies that it was corrections personnel - these Respondents - and not the medical staff, who chained Stanley Shepherd to his bunk and cleaned the floor with a towel while he strangled on his own blood.

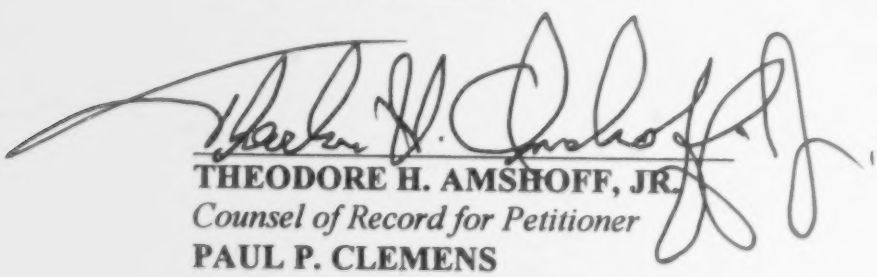
That Stanley Shepherd would choke to death under these circumstances was reasonably foreseeable; indeed, it was readily predictable. A person is presumed to have reasonably intended the logical consequences of his actions. If a risk is so obvious that a reasonable man would be bound to realize it, the court must infer that the Defendant did, in fact, realize it. *Farmer v. Brenhan*, 114 S. Ct. 1970, 1981 (1994).

Common humanity dictates that the Respondents ought to be held accountable for causing the death of Stanley R. Shepherd; and Petitioner urges this Court to so hold.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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APPENDIX A

§1983. Civil action for deprivation or rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

APPENDIX B

NOT RECOMMENDED FOR PUBLICATION

NO. 97-5844

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICIA A. TURNER,

Plaintiff-Appellant

v.

RICHARD A. FREY, JR.

_____/

BEFORE: KEITH, DAUGHTREY, and COLE, Circuit Judges.

PER CURIAM. Plaintiff-Appellant Patricia A. Turner, the administrator of the estate of Stanley R. Shepherd, appeals the district court's grant of summary judgment in favor of all Defendant-Appellees as to all of her 42 U.S.C. § 1983 claims. The district court found that there was no genuine issue of material fact as to any of Plaintiff-Appellant's claims and granted

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summary judgment for the Defendants. For the reasons set forth below, the district court's judgment is **AFFIRMED.**

I.

Stanley Shepherd was arrested at 4:45 p.m. on August 17, 1990 by the Louisville Police and charged with theft. Shepherd was transported to the Jefferson County Jail where he was booked, and arraignment was set for the following day. At the jail, he was given a health screening by a nurse employed by Correctional Medical Systems, Inc.[1] ("CMS"), which indicated a history of epilepsy, suicidal tendencies with one suicide attempt, and two anti-seizure medications. The examining nurse determined that Shepherd was at risk of suicide, ordered that he be placed on suicide watch, and filled out a suicide observation watch form which was placed outside Shepherd's cell. Because of the risk of suicide, Shepherd was not given a blanket, sheet

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[1]CMS is a private inmate health services provider under contract with the defendant Jefferson County. CM
:ttled with the plaintiff along with six medical or nursing professionals employed by them and they have been
ssed from the case by agreed order of dismissal entered August 6, 1992. However, by order entered June 26,
the defendant Jefferson County defendants were granted leave to file a third party complaint against CMS bas
fferson County's contractual right of indemnification.

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or jumpsuit; he received only a paper gown.

A Suicide Observation Form was placed outside Shepherd's cell and he was to be monitored by jail personnel every ten minutes. The form stated that the inmate was to be observed for suicide precautions but did not indicate that Shepherd was to be observed for seizures or delirium tremors.

Shepherd's time in his cell was uneventful until approximately 4:25 a.m. the next day. Defendant Officer Harold Adams, while on his rounds, found Shepherd lying under his bunk, face down, with blood on the floor. Officer Adams immediately notified the medical staff, and Nurse Norene Ahart and Physician Assistant Zeke Cannon with CMS responded. As Shepherd was lifted off the floor and cleaned up, Norse Ahart observed that it appeared Shepherd had spread the blood on his face and hands. She did not see any blood on Shepherd's mattress. Nurse Ahart also testified that she saw Shepherd "picking at his nose," but no mention of this was made in her Extraordinary Incident Report.

As the bleeding had stopped by the time Shepherd had been cleaned up, Ahart did not direct that Shepherd be transferred to an outside medical institution because she did not believe the situation was life-threatening. Physician Assistant Cannon then ordered that Shepherd be placed on his back in loose four point restraints to keep him from picking at his nose. Cannon tripled a mattress and placed it behind Shepherd's back to put him in a semi-sitting position.

Sergeant Copple and Officers Browning, Durham and Adams were present at the time Shepherd was observed on the floor and were present during the institution of the restraint process. Browning and Durham applied the four point restraint in accordance with the direction of the medical staff. Adams did not participate in the application of the restraints.

At 6:15 that same morning, Officer Adams notified Physician Assistant Cannon and Nurse Steven Philips that Shepherd's nose was bleeding again. Cannon and Philips came to Shepherd's cell and Cannon packed his nose with a nasal pack

with instructions that the pack be kept in place for twenty-four hours.

At approximately 6:45 a.m. Shepherd asked to use the toilet and get a drink. Officer Adams released Shepherd from his restraints and allowed him to do so and then he replaced the restraints on Shepherd. Nurse Philips checked the restraints once Shepherd was again restrained. At 7:03 a.m. Officer Adams observed Shepherd on his side trying to throw up. Adams reported this to Physician Assistant Cannon, who directed Adams to place something on the floor so that Shepherd would not throw up on the floor. A few minutes after 7:00, Officer Adams was relieved by Officer Cornatzer. Officer Adams advised Cornatzer of the events that had taken place. Cornatzer then went to check on Shepherd and observed that Shepherd was breathing and not bleeding.

At 8:20 a.m. Officer Smith went to Shepherd's cell to advise him of what he needed to do to prepare for his arraignment. Smith observed Shepherd lying on his mattresses

in four-point restraints. Smith alleged that when he tried to speak to Shepherd, he shook his chains and appeared to behave disruptively. There is no indication that Officer Smith had been advised of previous night's events or of Shepherd's condition. Smith did not notice any bleeding from Shepherd's nose.

At 8:45 a.m. Nurse Swindler and Officer Cornatzer went to Shepherd's cell to check the restraints. Nurse Swindler observed that Shepherd's pulse was faint and Cornatzer activated the emergency alarm. Sergeant Johnson responded to the emergency alarm and promptly summoned EMS.

EMS arrived and administered aid to Shepherd but could not revive him. They transferred him to the hospital, but Shepherd died shortly thereafter. The post mortem examination revealed blood-stained gauze packing inserted into the nostrils and blood in the bronchial tubes. The medical examiner believed that Shepherd's cause of death was attributable to aspiration of blood with a history of seizure disorder. his opinion was that a restrained Shepherd was unable to clear blood from his

passages.

After Shepherd's death, the Jefferson County modified their policy of four-pointing prisoners to require that prisoners be four-pointed face down.

II.

This Court reviews a district court's grant of summary judgment de novo. Barber v. City of Salem, Ohio, 953 F.2d 232, 235 (6th Cir. 1992). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories on file, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Celotex. Corp v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986).

III.

In order to establish a right to relief under 42 U.S.C. § 1983, a plaintiff must plead and prove at least two elements: (1) that he has been deprived of a right secured by the

Constitution and laws of the United States; and (2) that the defendant deprived him of this right while acting under color of law. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 155 (1978).

The constitutional provision which is the basis of the plaintiff's claim concerning supposedly inadequate medical care is the Eighth Amendment's prohibition against cruel and unusual punishment. The standard for determining whether the Eighth Amendment has been violated in cases alleging inadequate medical treatment of a prisoner was articulated in Estelle v. Gamble, 429 U.S. 97, 104-05, 97 S.Ct. 285, 50 L.Ed.2d 251, 260 (1976), when the Supreme Court wrote:

> [D]eliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under Section 198. . . This conclusion does not mean,

> however, that every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment.

A prison official is "deliberately indifferent" when under a subjective standard, he "knows of and disregards an excessive risk to inmates' health or safety. . ." Farmer v. Brennan, 114 S.Ct. 1970, 1979 (1994).

The plaintiff's case, as alleged, fails to present facts which would give rise to the "deliberate indifference" required of prison officials. When Shepherd was found lying on the floor of his cell, jail personnel picked him up, cleaned him up, and mopped the blood off the floor. They then, at the direction of the on-site medical officer, placed him on his back in loose four-point restraints, ostensibly to keep him from further harming himself. Shepherd was monitored throughout the night by prison officials. The medical personnel were alerted when Shepherd began bleeding from his nose again, at which time Physician Assistant Cannon and Nurse Philips packed Shepherd's nose with a nasal pack. Later, upon request, Officer

Adams allowed Shepherd to use the toilet and get a drink, and replaced the four-point restraints under the supervision of Nurse Philips. When Officer Adams observed Shepherd trying to throw up, he immediately alerted and followed the orders of Physician Assistant Cannon, who directed Adams to put something on the floor so that Shepherd would not throw up on the floor. When Adams' shift ended at 7:00 a.m., he advised his replacement, Officer Cornatzer, of the previous night's events. Officer Cornatzer then went and checked on Shepherd and observed that he was not bleeding and that he was breathing. At 8:30 a.m., Officer Smith went into Shepherd's cell and attempted to speak to Shepherd. In response, Shepherd shook his chains and appeared to behave in a disruptive manner. Officer Smith was making his rounds of the prisoners' cells that morning preparing them for arraignment. He had no way of knowing of the previous night's events or of Shepherd's condition. Officer Smith did not notice any bleeding from Shepherd's nose. At 8:45 a.m. Nurse Swindler and Officer Cornatzer went to

Shepherd's cell to check his restraints. When Nurse Swindler observed that Shepherd's pulse was faint, Officer Cornatzer immediately activated the emergency alarm and EMS was promptly summoned.

It should be noted that the guards followed the directions of the medical staff at all times. The four-point restraints were ordered by Physician Assistant Cannon and implemented by the guards under Cannon's supervision. The tripled mattresses placed under Shepherd's back were placed there by Cannon. The packing of Shepherd's nose was done by Physician Assistant Cannon. In short, there is no reason to think that the guards were deliberately indifferent to the serious medical needs of the prisoner as required by Estelle v. Gamble. They appear at all times to have reasonably relied upon the presence and judgment of the on site medical staff and do not appear to have possessed a sufficiently culpable state of mind to warrant a § 1983 claim.

IV.

Plaintiff has named as defendants the Jefferson County Corrections Department, the Jefferson County Fiscal Court, the County Judge/Executive and three Jefferson County Fiscal Court members in their official capacities. Because the above defendants were sued in their official capacity, it is as if plaintiff were suing Jefferson County itself. Monell v. Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978). As the Court stated:

> "[A] local government may not be sued under Section 1983 for an injury inflicted solely by its employees or agents. Instead it is when execution of a government's policy or custom...inflicts the injury that the government as an entity is responsible under Section 1983."

Monell, 436 U.S. at 694.

The question of the municipality's policy is not a difficult one. It would be a stretch to believe that, as plaintiff claims, there was a policy (either explicit or implicit) in Jefferson County of deliberate indifference to the serious medical needs of prisoners. The events in the case at bar are clearly tragic, but

they do not support the plaintiff's position. In fact, the record shows that the guards summoned medical personnel several times and followed the instructions of the medical personnel to the letter.

The question of the County's liability as a result of the four-point restraint policy is also easily dispensed with. The plaintiff claims that the county policy concerning the four-pointing of prisoners was drafted in a grossly negligent and reckless manner, since injury to a patient bleeding nasally is readily foreseeable. However, the plaintiff's view is somewhat misguided. The jail personnel did not four-point Shepherd until told to do so by the on-site medical official, Physician Assistant Cannon, and then only under his supervision. The guards who four-pointed Shepherd were reasonably relying upon the advice of a trained medical specialist and are not, under Estelle principles, required to second-guess such recommendations in such instances.

The plaintiff's claim against the County for failure to

train must also fail. The record reveals that the Jefferson County Detention Center requires all correctional officers to receive basic health care training, including first aid. As a matter of policy, jail personnel does not interfere with medical decisions made by the medical staff. There is no indication that Shepherd's death is in any way attributable to any failure of the county to train its correctional officers.

V.

The plaintiff claims that there was a genuine issue of arterial fact as to whether Shepherd was assaulted and battered while confined. After being examined by outside medical personnel, Shepherd was found to have swelling on his nose that was consistent with a blow to his nose. The district court excluded this claim because it was not raised in the complaint, and the plaintiff seeks to have this Court consider the issue. In support of her claim, the plaintiff offers deposition testimony of aa medical examiner that Shepherd's injury was likely caused by a blow because, "individuals who are conscious and not

handicapped tend to evade their fall." Blood was first seen on Shepherd when he was found under his bunk. The defendants do not claim to know how or why Shepherd's nose began bleeding, but Nurse Ahart did testify to having seen Shepherd "picking at his nose." The plaintiffs speculate that the nosebleeds were caused by a blow to the nose administered by jail officials. The district court, however, properly determined that the question of whether Shepherd was struck on the nose is irrelevant to the issue of whether the defendants denied Shepherd adequate medical care, and so we do not reach this issue on appeal.

Fore the foregoing reasons, the grant of summary judgment by Judge Dixon of the United States District Court for the Western District of Kentucky is **AFFIRMED.**

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE
CIVIL ACTION NO. C91-0532-L(D)

PATRICIA A. TURNER, **PLAINTIFF**

v.

RICHARD A. FREY, JR., ET AL. **DEFENDANTS.**

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

Upon the response by the Jefferson County Defendants to the Plaintiff's motion for reconsideration, and the Court being sufficiently advised,

IT IS HEREBY ORDERED that the Plaintiff's motion for reconsideration is denied.

DATE: _____

_____
JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE
Civil Action No. C 91-0532 L(D)

PATRICIA A. TURNER, PLAINTIFF,

VS.

RICHARD A. FREY, JR., et al., DEFENDANTS.

MEMORANDUM OPINION

This is an action pursuant to 42 U.S.C. § 1983 alleging constitutional violations in connection with the death of Stanley A. Shepherd at the Jefferson County Jail on August 18, 1990. The defendants have moved for summary judgment (DN 122) the plaintiffs have responded thereto (DN 124) and the defendants have filed a reply (DN 126). The Court has considered the memoranda of the parties and relevant portions of the file and the matter is now ready for determination.

Mr. Shepherd was arrested on August 17, 1990 by the Louisville, Kentucky police. He was transported to the

Jefferson County Jail and was held in lieu of posting bail. The arrest occurred at 4:45 p.m. and at 6:00 p.m. he was given a health screening by a nurse with Correctional Medical Systems, Inc. ("CMS"), the private inmate health services provider under contract with the defendant Jefferson County. (CMS has settled with the plaintiff along with six medical or nursing professionals employed by them and they have been dismissed from the case by agreed order of dismissal entered August 6, 1992. However, by order entered June 26, 1996, the Jefferson County defendants were granted leave to file a third party complaint against CMS based on Jefferson County's contractual right of indemnification. That was the subject of a memorandum opinion (DN 105) which granted summary judgment to CMS but a subsequent order (DN 114) which vacated the summary judgment.)

During his health screening, Shepherd indicated a history of epilepsy, suicidal ideation with one suicide attempt and two current medications. The nurse decided that he was a high risk for suicide and ordered that he be placed on suicide precautions

with observation at ten minute intervals. She issued a suicide observation form which is posted outside the inmate's cell so it can be used by security staff to monitor the inmate. Shepherd's observation form directed that he have no blanket, sheet or jump suit and that he wear only a paper gown. It did not instruct that he was to be observed for seizures or delirium tremors.

Shepherd was continued on suicide observation and at 4:25 a.m. the next morning he was found by Officer Adams lying under his bunk face down with blood on the floor. Officers Browning and Durham were already in the unit attending to an unrelated inmate problem. Officer Adams immediately notified medical staff and nurse Norene Ahart and physician assistant Zeke Cannon with CMS responded. Sergeant Copple was also summoned. Nurse Ahart observed that Shepherd was bleeding from his nose and he had blood on his face, his hands and on his paper gown. By the time Shepherd was cleaned of the blood his nose bleeding had stopped. Nurse Ahart observed no signs of trauma although

Shepherd was seen picking at his nose. Nurse Ahart did not direct that Shepherd be transferred to an outside medical institution because she did not view the situation life threatening. Physician Assistant Cannon ordered that Shepherd be placed in very loose restraints to keep him from picking at his nose. Cannon tripled a mattress and placed it behind Shepherd's back to put him in a semi-sitting position. Shepherd's nose was not packed with gauze because the bleeding had stopped.

Sergeant Copple and Officers Browning, Durham and Adams were present at the time Shepherd was observed on the floor and were present during the institution of the restraint process. Browning and Durham applied the four point restraint in accordance with the directions of the medical staff. Adams did not participate in the application of the restraints.

At 6:15 a.m. the same morning Adams notified medical staff that Shepherd was again bleeding from his nose. Physician Assistant Cannon and Nurse Phillips responded by coming to Shepherd's cell. His nose was packed with a nasal pack with

directions that the pack be kept in place for 24 hours. Adams did not participate in the packing of Shepherd's nose.

At approximately 6:45 a.m. Shepherd asked to use the toilet and get a drink. Nurse Phillips returned and Officer Adams released Shepherd from his restraints. Nurse Phillips checked Shepherd's restraints once he was again placed in them.

The required ten minute observations were continued by Officer Adams. Officer Adams did not see Shepherd bleeding but he did observe him on his side trying to throw up at about 7:03 a.m. Officer Adams reported this information to physician assistant Cannon. Physician assistant Cannon's response to this observation was a request that Adams put something on the floor so that Shepherd would not throw up on the floor.

Officer Adams was relieved a few minutes after 7:00 a.m. by Officer Cornatzer. Officer Adams advised Officer Cornatzer of the events which occurred, including the fact that Shepherd was on suicide precaution observation and that he was in restraints. An in cell check was conducted and Officer

Cornatzer observed that Shepherd was not bleeding and that he was breathing. Officer Cornatzer conducted the observations and observed only that Shepherd had turned his head.

At about 8:20 a.m. Officer Smith, who was the court officer, went to Shepherd's cell to advise him of what he needed to do to prepare himself to go to court. Officer Smith observed Shepherd lying on what appeared to be mattresses behind his head and was in four point restraints. When Officer Smith attempted to speak with Shepherd, he shook his chains and appeared to behave in a disruptive manner. Therefore, Officer Smith left and attended to other business. Officer Smith last saw Shepherd when he passed back through the unit at 8:30 a.m. Officer Smith never noticed any bleeding from Shepherd's nose.

At about 8:45 a.m., Ms. Swindler, a registered nurse, accompanied by Officer Cornatzer, went to Shepherd's cell to check his restraints having received a prior briefing on the situation. When Ms. Swindler arrived, she observed no blood

or vomit although she noticed water on the floor. She did not get a response from Shepherd and felt a very faint pulse. She did not believe that Shepherd was dead because of a lack of certain symptoms. Officer Cornatzer activated the emergency alarm and Nurse Swindler left to get medical equipment and oxygen. Emergency treatment was started and emergency medical services was notified.

Sergeant Ed Johnson responded to the emergency alarm. He observed Shepherd lying on the bunk in four point restraints with a mattress rolled up under Shepherd's shoulders, Shepherd's nose was packed and taped. When Sergeant Johnson observed that Shepherd was not breathing, he contacted EMS.

The emergency medical service received a call at 8:47 a.m. The emergency medical service arrived at the jail at 8:45 a.m. At the time that the emergency medical service arrived Shepherd was receiving compressions but was not receiving ventilations because the oxygen cannula from the oxygen

canister was placed in Shepherd's mouth instead of his nose. They intubated Shepherd, began additional life saving procedures and subsequently transferred him to the hospital. The jail was notified by the hospital at 9:14 a.m. that Shepherd died.

A post mortem examination was conducted that afternoon and it revealed no single anatomic cause of death. The time of death was estimated at approximately four hours prior to the examination. The examination revealed blood stained gauze packing inserted into the nostrils. The medical examiner noted evidence of blood in the bronchial tubes. The medical examiner opined that Shepherd's cause of death was attributed to aspiration of blood with a history of seizure disorder. Notably, the medical examiner had been informed by the coroner that Shepherd was secured flat on his back by four point restraints. His opinion was that Shepherd, being restrained, was unable to clear the blood from his passages. The medical examiner also opined that the elevation of Shepherd's

head would have assisted in maintaining a clear airway.

The written contract between Jefferson County and CMS required that CMS provide comprehensive inmate health services to include 24 hour nursing coverage, health care evaluations and screenings, in-house infirmary care, emergency medical care and pharmacy services management. Pursuant to the terms of the contract CMS was required to assist Jefferson County Detention Center in developing a suitable program of health care training to Jefferson County Detention Center staff which included training in CPR, first aid, response to medical emergency or disaster and other topics. CMS was required under the terms of the contract to submit monthly statistical reviews of health services provided. Additionally, CMS was required to develop a quality assurance program that included working with a medical audit committee in developing a policy and procedure review.

In addition to the above described health services contract, Jefferson County also entered into a contract for the

services of a physician specialist whose responsibilities as a "responsible physician" included conducting sick calls, insuring 24 hour on-call medical coverage, participating in monthly meetings and reviewing and evaluating Jefferson County Detention Center's medical unit policies and procedures. Jefferson County further contracted with a secondary physician specialist to provide medical care, including sick call.

The policy and procedure of Jefferson County Detention Center required that all correctional officers receive training in health care. The training included first aid and CPR with additional medical related topics included into the basic academy training as determined by the physician. As a matter of policy, the Jefferson County Detention Center does not interfere with medical decisions of medical staff. The Jefferson County Department of Corrections considers it to be the medical staff's final determination as to when an inmate is restrained for medical reasons, whether an inmate should be transported to an outside hospital and an inmate's treatment plan. The corrections

staff may interact with the medical unit regarding treatment by the final judgment is by the medical staff.

At the time of the incident, Jefferson County Detention Center post order, four point restraints, provided that an inmate ordered to be placed in four point restraints by a supervisor, psychologist or medical staff would be restrained on his back on the bunk. Under CMS policy, medical restraints are approved by a physician. There had been no incident previous to the Shepherd incident where an inmate had died after being four pointed on his back.

In defense of the motion, the plaintiff contends that Shepherd was probably struck in the nose thereby causing the nose bleed. Plaintiff asserts that much of the factual evidence points to an assault and battery. Plaintiff argues that assault and battery violates the well established and clearly defined constitutional rights of the decedent. The plaintiff contends that a reasonable person under the facts could conclude that the defendants were deliberately indifferent to a serious medical

need of the decedent Shepherd. Further, plaintiff contends that the defendant Jefferson County's policy on four pointing violates § 1983 as does its failure to train its officers of the danger of this policy. Lastly, the plaintiff contends that voluntarily allowing the decedent Shepherd to remain unclothes while chained to the bunk violated his constitutional right to privacy. In regard to the pendent state law claims, plaintiff contends that all defendants are not part of the county and those sued in their individual capacities are still subject to suit under state law including the wrongful death state law action.

Plaintiff has named defendant Richard A. Frey, Jr. in his individual capacity. At the time the incident occurred defendant Frey was the Executive Director of the Jefferson County Department of Corrections. Defendants assert that to establish liability against a supervisory official, plaintiff must establish that the supervisor was somehow involved in the complained of unconstitutional conduct and that liability cannot be established based on the right to control or under a respondeat superior

theory of liability. Defendants argue that plaintiff cannot establish that defendant Frey was present when the incident occurred, or that he approved, encouraged or knowingly acquiesced to the alleged unconstitutional conduct. Defendants contend that plaintiff's allegations fail to state a claim against defendant Frey. Additionally, defendants contend that there is no evidence in the record that defendant Frey was deliberately indifferent to the medical needs of Shepherd. Furthermore, there is no evidence that defendant Frey was, as a supervisor, aware of an obvious, substantial risk to inmate safety when inmates with nose bleeds are restrained on their backs. Defendants contend that plaintiff's claims against defendant Frey should be dismissed.

Defendants Copple, Browning and Durham contend that plaintiff cannot establish that they were deliberately indifferent to Shepherd's serious medical needs in restraining him to his bunk. Defendants assert that the evidence in the record supports no inference that they acted deliberately in disregard of

an obvious need for medical attention. The officers contend that the record clearly establishes that they relied upon the presence and judgment of the medical staff. The four point restraining of Shepherd subsequent to packing of his nose was at the instruction of the trained medical professionals. Defendants Copple, Browning and Durham contend that they are entitled to summary judgment because there is no evidence in the record to support a finding that they acted with a sufficiently culpable state of mind to satisfy the subjective component of the Eighth Amendment.

The defendants Adams and Cornatzer contend that plaintiff cannot establish that they were deliberately indifferent by failing to monitor Shepherd.

The defendant Smith apparently is not the subject of any specific allegation. He contends there is no support in the record to establish any liability on his part inasmuch as he simply went to Shepherd's cell to inform him of the need to prepare to go to court and that therefore there is no evidence in the record

that he was subjectively and deliberately indifferent to Shepherd's medical needs. Alternatively, defendant Smith contends that he is entitled to qualified immunity.

The defendants Frey, Copple, Browing, Durham, Adams, Cornatzer and Smith alternatively argue that they are entitled to qualified immunity in that plaintiff did not have a clearly established constitutional right under Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285 (1976). They contend that these officers are not required under the constitution to determine the seriousness of the medical need or to second guess treatment where medical personnel have exercised professional judgment and that they have no responsibility to interfere with the medical care secured.

Lastly, the defendants Jefferson County Corrections Department, the Jefferson County Fiscal Court and the County Judge/Executive and the three Jefferson County Fiscal Court Members who are named in their official capacities contend they should be dismissed inasmuch as the suit against them is in

essence a suit against Jefferson County, a governmental entity which cannot be held liable in a § 1983 action unless the plaintiff proves that the unconstitutional conduct complained of was the result of a policy or custom of the governmental entity. These defendants contend that first the municipal liability claim should be dismissed because plaintiff has failed to establish that there was conduct of the individual officials amounting to a deliberate indifference to the decedent's medical needs. Secondly, and assuming such unconstitutional conduct, these defendants contend that plaintiff cannot establish a policy or custom of the County of deliberate indifference to inmates' serious medical needs.

With respect to plaintiff's right to privacy claim, the defendants contend that the evidence indicates Shepherd was placed in a paper gown prior to being placed in the cell. Defendants contend that the evidence shows that after Shepherd was found lying on the floor beneath his bunk he was cleaned up and the gown was replaced. According to defendants, plaintiff

merely claims that some time prior to transportation to the hospital Shepherd was nude. Defendants argue that inmates do not retain a right of privacy under the Fourth Amendment. Furthermore, under the substantive due process guarantees under the Fourteenth Amendment, plaintiff cannot establish a constitutional deprivation. Therefore defendants contend that they are entitled to summary judgment on the claim.

Finally, defendants contend that since they are entitled to summary judgment as to all plaintiff's federal claims, the Court should dismiss the state law claims without prejudice. Defendants also contend that the state law claims against the Jefferson County entities and the individual defendants, to the extent they are named in their official capacities, should be dismissed under the Kentucky doctrine of sovereign immunity. The defendants contend that inmates do not retain a right of privacy.

In their reply memorandum defendants contend that plaintiff's response to the motion for summary judgment does

not indicate that there are genuine issues of material fact as to whether the Jefferson County defendants denied Shepherd adequate medical care. As a result, defendants claim they are entitled to judgment as a matter of law. Defendants object to plaintiff's assertion of the state law claim of assault and battery in the response memorandum because that issue was not set forth within plaintiff's complaint. Defendants assert that the complaint only concerns whether Shepherd was denied adequate medical care while incarcerated at the Jefferson County Jail. Defendants assert that by order entered November 15, 1995 the Court granted defendant's motion in limine which precludes plaintiff from introducing evidence that the jail officials or employees struck plaintiff (see DN 96).

Defendants contend that the argument set forth within plaintiff's response memorandum ignores the uncontroverted fact that Shepherd was restrained on his back in spite of his nose bleeding condition pursuant to the directive of medical staff and in the presence of medical staff. Defendants contend that

plaintiff's argument also ignores the fact that medical staff packed Shepherd's nose knowing that he would be restrained on his back. Defendants contend that plaintiff's argument that Jefferson County is liable for failing to rain its staff on restraining an individual with a nose bleed, and for recklessly drafting a policy on restraints, is "nonsensical because medical staff was present at the time the restraints were applied, and medical staff monitored inmate Shepherd while he was in restraints." (DN 126, p. 6).

CONCLUSIONS OF LAW

According to Fed.R.Civ.P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." See Canderm Pharmacal, Ltd. V. Elder Pharmaceuticals, Inc., 862 F.2d 597, 601 (6th Cir. 1988). The moving party bears the burden of demonstrating the absence of a genuine issue of

material fact. Cellotex Corp. V. Catrett, 477 U.S. 317, 324 (1986). We must look to the substantive law controlling this case to identify which facts are material for summary judgment analysis. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (citations omitted).

The moving party's burden may be discharged by demonstrating an absence of evidence to support an essential element of the nonmoving party's case for which he or she has the burden of proof. Cellotex Corp., 477 U.S. at 323. Once the moving party demonstrates this lack of evidence, the burden passes to the nonmoving party to establish, after an adequate opportunity for discovery, the existence of a disputed factual element essential to his or her case with respect to which he or she bears the burden of proof. Id. If the record taken as a whole could not lead the trier of fact to find for the nonmoving party, the motion for summary judgment should be granted. Matsushita Elec. Indus. Co. V. Zenith Radio Corp., 475 U.S. 574, 586 (1986). If the evidence is merely colorable, or is not

significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249-50.

The Sixth Circuit in Street v. J.C. Bradford & Co., indicated that the following principles have been established by the "new era" of summary judgment practice in the federal courts:

> 1. Complex cases are not necessarily inappropriate for summary judgment.
>
> 2. Cases involving state of mind issues are not necessarily inappropriate for summary judgment.
>
> 3. The movant must meet the initial burden of showing "the absence of genuine issue of material fact" as to an essential element of the non-movant's case.
>
> 4. This burden may be met by pointing out to the court that the respondent having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.
>
> 5. A court should apply a federal directed verdict standard in ruling on a motion for summary judgment. The inquiry on a summary judgment motion or a directed verdict motion is the same: "whether the evidence presents a

sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."

6. As on federal directed verdict motions, the "scintilla rule" applies, *i.e.*, the respondent must adduce more than a scintilla of evidence to overcome the motion.

7. The substantive law governing the case will determine what issues of fact are material, and any heightened burden of proof required by the substantive law for an element of the respondent's case, such as proof by clear and convincing evidence, must be satisfied by the respondent.

8. The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must "present affirmative evidence in order to defeat a properly supported motion for summary judgment."

9. The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of a material fact.

10. The trial court has more discretion than in the "old era" in evaluation the respondent's evidence. The respondent must "do more than simply show that there is some metaphysical doubt as to the material facts." Further, [w]here the record taken as a whole could not lead the rational trier of fact to find" for the respondent, the motion should be granted. The trial court

> has at least some discretion to determine whether the respondent's claim is implausible."

Street, 886 F.2d 1479-1480 (6th Cir. 1989) (citations omitted).

In order to establish a right to relief under 42 U.S.C. Section 1983, a plaintiff must plead and prove at least two elements: (1) that he has been deprived of a right secured by the Constitution and laws of the United States; and (2) that the defendant deprived him of this right while acting under color of law. Flagg Brothers, Inc. V. Brooks, 436 U.S. 149 (1978).

The constitutional provision which is the basis of the plaintiff's claim concerning supposedly inadequate medical care is the Eighth Amendment. The standard for deciding whether the Eighth Amendment has been violated was stated as follows:

> [D]eliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment. This is true whether the

---

[1]Plaintiff's response to the motion for summary judgment attempts to raise an issue of whether Mr. Shepherd's nose bleed was caused by physical abuse. However, the complaint only alleges the denial of adequate medical care while incarcerated at the Jefferson County Jail. Defendants have objected. The undersigned agrees with defendants that the question of whether Mr. Shepherd was struck on the nose is irrelevant to the issue of whether defendants denied him adequate medical care.

> indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under Section 1983.

Estelle v. Gamble, 429 U.S. 97, 104-05, 97 S.Ct. 285, 50 L.Ed.2d 251, 260 (1976) (citations and footnotes omitted). These standards were explained further by the Supreme Court stating that the action must be "characterized as . . . repugnant to the conscience of mankind." 429 U.S. at 105, 97 S.Ct. 285, 50 L.Ed.2d 251. Essentially the same standard applies to pretrial detainees. City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 244-46, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983).

The threshold element of this Eighth Amendment claim is that there must be "a serious medical condition" that must be obvious to correctional officers. The courts in this Circuit require a showing that the prisoner's medical condition be not

only serious, but requiring immediate medical attention. Inmates, Washington County Jail v. England, 516 F.Supp. 132, 139 (E.D. Tenn.), aff'd, 659 F.2d 1081 (6th Cir. 1981). Moreover, other courts have noted that "[a] 'serious' medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." Laaman v. Helgemoe, 437 F.Supp. 269, 311 (D.N.H. 1977) (citations omitted).

When a prisoner has received some medical attention and the dispute centers upon the adequacy of his treatment, the federal courts will not second guess medical judgments to constitutionalize claims which are more properly raised under state tort law. Westlake v. Lucas, 537 F.2d 857, 860, n.5 (6th Cir. 1976). See also Molton v. City of Cleveland, 839 F.2d 240, 243 (6th Cir. 1988), cert. Denied, 489 U.S. 1068 (1989). Further, in this Circuit, the allegedly unconstitutional act must demonstrate deliberateness "tantamount to an intent to punish."

Molton, 839 F.2d at 243 (emphasis added).

"The Eighth Amendment does not require that the medical care be the best available nor does it protect inmates from isolated incidents of improper diagnosis and treatment." Grubbs v. Bradley, 552 F.Supp. 1052 (M.D.Tenn. 1982). Plaintiff must show that he suffered from a serious disease or injury, that there was a substantial potential for harm if medical care was delayed or denied, and that such harm did result. Westlake v. Lucas, supra. Similarly, where a state prisoner was incarcerated for a period in a county jail and there was no support for the conclusions that the unavailability of medicines prescribed by the state prison doctor caused him to suffer lasting damage to his health or that any pain he suffered was consciously inflicted by defendants solely to punish him, the plaintiff was held not to have a claim under 42 U.S.C. Section 1983. Russell v. Enser, 496 F.Supp. 320 (D.S.C. 1979), aff'd, 624 F.2d 1095 (4th Cir. 1980).

Plaintiff has sued defendant Richard A. Frey, Jr. in his

individual capacity. At the time that the incident occurred defendant Frey was the Executive Director of the Jefferson County Department of Corrections. The undersigned noes that the Doctrine of Respondeat Superior does not apply in Section 1983 lawsuits to impute liability onto supervisory personnel. Taylor v. Michigan Dept. of Corrections, 69 F.3d 76, 80-81 (6th Cir. 1995); Walton v. City of Southfield, 995 F.2d 1331, 1340 (6th Cir. 1993). In order to find a supervisor liable a plaintiff must allege that the supervisor condoned, encouraged or knowingly acquiesced in the alleged misconduct. Taylor, 69 F.3d at 80-81; Walton, 995 F.2d at 1340. Defendants have demonstrated a lack of evidence to show that defendant Frey either condoned, encouraged or knowingly acquiesced in the alleged incident. Further, defendants have demonstrated a lack of evidence to support plaintiff's contention that defendant Frey failed to properly set policy and failed to supervise or train the corrections officers and medical personnel to properly care for Shepherd's medical needs. The burden passed to plaintiff to

establish the existence of a disputed fact essential to these issues. Cellotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). However, plaintiff failed to demonstrate the existence of a disputed fact on these issues.

In regard to defendants Copple, Browning, Durham, Adams, Cornatzer and Smith the key facts herein do not indicate deliberate indifference by defendants to the medical needs of Shepherd. In each instance when a serious medical condition was obvious to the defendant officers the appropriate steps were taken to arrange medical treatment. All acts by the above Officers were at he direction and supervision of trained medical personnel. It would be contrary to the principles set forth in Estelle to require the defendant Officers to second guess the judgment of the medical staff. See, Estelle v. Gamble, 429 U.S. 97, 104-105 (1976).

Since the undersigned finds that the above defendants were not deliberately indifferent to the medical needs of Shepherd there is no Eighth Amendment violation. Therefore

the undersigned need not determine whether the officers are protected by qualified immunity.

Plaintiff has named as defendants the Jefferson County Corrections Department, the Jefferson County Fiscal Court, the County Judge/Executive and three Jefferson County Fiscal Court members in their official capacities. Because the above defendants were sued in their official capacities, it is as if plaintiff is suing Jefferson County. Monell v. Dept. of Social Services, 436 U.S. 658 (1978). As the Court stated in Monell:

> "[A] local government may not be sued under Section 1983 for an injury inflicted solely by its employees or agents. Instead it is when execution of a government's policy are custom...inflicts the injury that the government as an entity is responsible under Section 1983."

Monell, 436 U.S. at 694.

The United States Supreme Court further elaborated on this standard in City of Oklahoma City v. Tuttle, 471 U.S. 808, 85 L.ed.2d 791, 105 S.Ct. 2427 (1985), reh'g denied, 473 U.S. 925, 87 L.Ed.2d 695, 106 S.Ct. 16 (1985). Therein, the court

stated:

> In the first place, the word 'policy' generally implies a course of action consciously chosen from among various alternatives; . . . some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in Monell will become a dead letter. Obviously, if one retreats far enough from a constitutional violation some municipal 'policy' can be identified behind almost any such harm inflicted by a municipal official; . . . [b]ut Monell must be taken to require proof of a city policy . . . before a claim can be sent to a jury on the theory that a particular violation was 'caused' by the municipal 'policy.' At the very least there must be an affirmative link between the policy and the particular constitutional violation alleged.

Tuttle, 471 U.S. at 823, 85 L.Ed.2d at 04, 105 S.Ct. at 2436 (emphasis added).

The Supreme Court held that a municipality can be held liable under 42 U.S.C. Section 1983 for constitutional violations caused by its official policies, including unwritten customs. Id. 15 691. However, as clearly set forth in Monell and other cases such as Wells v. City of Carrollton, 678 F.Supp. 632 (N.D.Tex. 1988),

> "to recover under this cause of action, plaintiff must plead and prove that defendants' employees acted (1) in conformity with an official policy adopted by defendant's lawmaking or policy making officials, or (2) pursuant to a persistent, widespread practice that is so common and well-settled as to constitute a custom which represents municipal policy attributable to defendants' policy making authority." (Emphasis added) Citing Bennett v. City of Slidell, 735 F.2d 861 (5th Cir. 1984). See also 81 ALR Fed 549.

A single incident does not meet the custom or policy requirement necessary to hold the municipality liable under 42 U.S.C. 1983. In Strauss v. Chicago, 760 F.2d 765 (7th Cir. 1985), the Court of Appeals held "Proximate causation between the municipality's policy or custom and the plaintiff's injury must be present." "We affirm the lower court's dismissal of Strauss' complaint for failure to state a claim because he has alleged no facts to suggest that the policies of which he complains actually exists." And furthermore, the court stated with regard to the issue of custom, "Nothing in the complaint suggests that the incident was other than an isolated one unrelated to municipal

policy, leading us to affirm the dismissal of the complaint." Id. at 766.

Plaintiff has failed to establish that there was conduct by the individual officers amounting to a deliberate indifference to Shepherd's medical needs. In the absence of an underlying constitutional deprivation, plaintiff has no constitutional claim against Jefferson County. See City of Los Angeles v. Heller, 475 U.S. 796 (1986).

Plaintiff has also failed to establish the existence of a policy or custom of deliberate indifference to inmates with serious medical needs. The policy and procedure of the Jefferson County Detention Center requires all correctional officers receive health care training, including first aid. As a matter of policy the Jefferson County Detention Center requires all correctional officers receive health care training, including first aid. As a matter of policy the Jefferson County Detention Center officers do not interfere with medical decisions by the medical staff. The medical staff provided medical care,

determined that transfer to an outside hospital was not necessary, ordered that Mr. Shepherd should be restrained and then supervised the application of the four point restraint system. There is no evidence that a failure to train the defendant officers was a proximate cause of Shepherd's death.

Plaintiff alleges a violation of Mr Shepherd's right to privacy in connection with a claim that Mr. Shepherd was left lying nude on his bunk in his cell. The cause for invasion of privacy is based upon the right of an individual to be left alone and to be free from unwarranted interference from the public in matters in which they are not necessarily concerned. McCall v. The Courier Journal & Louisville Times, 623 S.W.2d 882, cert. denied, (Ky. 1981), 456 U.S. 975 (1982; Wheeler v. Sorensen Manufacturing Co., 415 S.W.2d 582 (Ky. App. 1967). However, this right to privacy is not absolute. Wheeler, 415 S.W.2d at 585.

The basic principles of the tort of invasion of privacy are set forth in the Restatement (Second) of Torts Section 652(A).

See McCall, 623 S.W.2d at 887. In order to state a cause of action for invasion of privacy, the plaintiff must show actual malice. Yancy v. Hamilton, 786 S.W.2d 854 (Ky. 1989). Thus, absent a showing of actual malice, plaintiff has no cause of action for invasion of privacy. Defendants have demonstrated a lack of evidence of actual malice and plaintiff has failed to establish the existence of a disputed factual element essential to this issue.

The Sixth Circuit has indicated that trial courts should not retain jurisdiction over pendent state law claims when the federal claims have been dismissed before trial. Service, Hospital, Nursing Home and Public Employees Union, Local No. 47 v. Commercial Property Services, Inc., 755 F.2d 499, 506n.9 (6th Cir.), cert. denied, 474 U.S. 850 (1985). Dismissal of the pendent state law claims is required once the federal claim is dismissed. Id., See United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966); Kurz v. Michigan, 548 F.2d 172, 175 (6th Cir.), cert. denied, 434 U.S. 972 (1977); Gibson

v. First Federal Savings and Loan Ass'n. of Detroit, 504 F.2d 826, 830-831 (6th Cir. 1974). Dismissal of the state law claims on their merits would be inappropriate. Local No. 47, 755 F.2d at 506. The proper approach is to dismiss the state law claims without prejudice for want of jurisdiction. Id. Since defendants are entitled to summary judgment as to all of plaintiff's federal claims then the state law claims should be dismissed without prejudice.

Summary judgment shall be entered consistent with this Memorandum Opinion.

This _____ day of February, 1997.

JOHN M. DIXON, JR.
UNITES STATES MAGISTRATE JUDGE

Copies:
Counsel

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE
CIVIL ACTION NO. C91-0532-L(D)

PATRICIA A. TURNER, **PLAINTIFF**

v.

RICHARD A. FREY, JR., ET AL. **DEFENDANTS.**

ORDER

For the reasons set forth in the Memorandum Opinion entered this date, it is hereby **ORDERED** that summary judgment is entered in favor of the defendants and against plaintiff as to all the plaintiff's 42 U.S.C. § 1983 claims. Fed.R.Civ.P. 56. Further, plaintiff's remaining state law claims are dismissed without prejudice for want of jurisdiction. This is a final and appealable order and there is not just reason for delay.

This 26th day of February, 1997.

JOHN M. DIXON, JR.
UNITED STATES MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
MAR 1 1999
OFFICE OF THE CLERK

No. 98-1207

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

PATRICIA A. TURNER,
Petitioner,

versus

RICHARD A. FREY, JR., Et Al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition does not accurately list the respondents to the proceeding because no "Doe" defendants were ever served with summons and Complaint or otherwise made a part of the district court action or appeal to the United States Court of Appeals for the Sixth Circuit.

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STATEMENT OF THE CASE

On August 15, 1991, Petitioner (hereafter referred to as "Plaintiff") filed an action pursuant to 42 U.S.C. §1983 alleging a violation of the Constitutional right to adequate medical care in connection with the death of inmate Stanley R. Shepherd on August 18, 1990. Shepherd was incarcerated in the Jefferson County Jail from August 17, 1990 to August 18, 1990. The Jefferson County Jail is a facility maintained by the Jefferson County Department of Corrections, a division of Jefferson County, Kentucky government.

Plaintiff sought to hold thirteen (13) Jefferson County defendants, all Respondents to this Petition, liable for Shepherd's death. Named as a defendant in both his individual and official capacities was Richard A. Frey, Jr., Executive Director of the Jefferson County Department of Corrections at the time of the incident. Also named as defendants in both their individual and official capacities were six (6) correctional security staff who were working in the jail during the period Shepherd was incarcerated there: Sergeant Donald Copple and Officers Derek Browning, Michael Durham, Harold Adams, Dale Cornatzer and Ezell Smith.

Further, Plaintiff named as defendants the Metropolitan Department of Corrections [Jefferson County Department of Corrections] (hereafter referred to as "JCDC,") and the Jefferson County Fiscal Court. Finally, Plaintiff named as defendants Jefferson County Judge/Executive David Armstrong and Jefferson County Fiscal Court members Irvin Maze, Darryl Owens and Chris Gorman.

In addition to the thirteen Jefferson County defendants, the Complaint also originally named as defendants Correctional Medical Systems, Inc. (hereafter referred to as "CMS"), the private inmate health services provider under contract with Jefferson County, and six (6) medical or nurs-

ing professionals employed by or agents of CMS. By Agreed Order of Dismissal entered August 6, 1992, these defendants were dismissed from the action, with prejudice, as settled.[1]

Invoking the pendent jurisdiction of the Court, Plaintiff also brought a state law wrongful death claim. Plaintiff requested a declaratory judgment, and compensatory and punitive damages.

The Petitioner's statement, as contained in her Statement of the Case, that inmate Shepherd was restrained to his bunk "[f]or reasons which are not entirely clear," ignores the wealth of evidence presented in this case, which Plaintiff could not rebut.

On August 17, 1990 at 4:45 p.m., Stanley Shepherd was arrested by Louisville Police and charged with theft by unlawful taking under $100 and terroristic threatening. Shepherd was transported to the Jefferson County Jail by Louisville Police. Shepherd was booked into the jail, the booking process being completed by 6:10 p.m. Shepherd was held with a bond of $2500/10%, with arraignment set for August 18, 1990, at 9:00 a.m.

During the booking process, and in accordance with JCDC policy, Shepherd was given a health screening by CMS nurse Ann Burns, RN. During this screening, Shepherd indicated a history of epilepsy, suicidal ideation with one suicide attempt, and two current medications, Dilantin 400 mg and Doxipin 200 mg. Nurse Burns determined that Shepherd was at high risk of suicide because he scored "15 points" on the CMS suicide risk checklist. Nurse Burns ordered that Shepherd be placed on suicide precautions

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[1] By Order entered June 26, 1996, however, the Court granted Jefferson County's motion for leave to file a third-party complaint against CMS based on Jefferson County's contractual right of indemnification.

observation at ten minute intervals and issued a Suicide Observation Form.

The purpose of a Suicide Observation Form is that it is posted outside an inmate's cell and used by security staff to monitor an inmate. This particular Observation Form directed that Shepherd have no blanket, sheet, or jumpsuit. The form further instructed that Shepherd was to wear only a paper gown. The form stated that the purpose of the observation was for suicide precautions. The "Special Instructions" section of the form did not indicate that Shepherd was to be observed for seizures or delirium tremors. Security staff began suicide observation at 6:30 p.m.

Shepherd was moved from the basement booking area into a single cell located in a housing unit known as "City Side." Shepherd was placed in a paper gown and transported to his single cell without incident. Shepherd was continued on suicide observation at ten minute intervals.

Defendant Officer Harold Adams was the security posted in City Side from 11 p.m. to 7 a.m. At approximately 4:25 a.m., Officer Adams found Shepherd lying under his bunk, face down, with blood on the floor. Officer Adams immediately notified medical staff. Nurse Norene Ahart, LPN, and Physician Assistant Zeke Cannon responded.

Nurse Ahart observed that Shepherd had blood from his nose, and on his face and hands. Nurse Ahart believed that Shepherd had spread the blood on his face with his hands. Nurse Ahart also observed blood on Shepherd's paper gown, but saw no blood on the mattress.

By the time Shepherd was cleaned of the blood, the nose bleeding had stopped. Nurse Ahart observed no signs of trauma, but did see Shepherd picking at his nose. Nurse Ahart did not direct correctional staff to transport Shepherd to an outside hospital because she did not view the situation as life threatening because the nose bleeding had already stopped. Physician Assistant Zeke Cannon then

ordered that Shepherd be placed in very loose four-point restraints to keep him from picking at his nose. Cannon tripled a mattress and placed it behind Shepherd's back to put him in a semi-sitting position. Because the bleeding had stopped, Shepherd's nose was not packed with gauze at this time. Nurse Ahart checked the four-point restraints and completed the Medical Report Section in the Extraordinary Incident Report.

Sergeant Donald Copple and Officers Derek Browning, Michael Durham and Harold Adams were present at the time Shepherd was observed on the floor and were present during the four-point process. Sergeant Copple had been summoned to the unit after Shepherd was found on the floor. Officers Browning and Durham placed Shepherd into four-point restraints in accordance with the directions of medical staff.

At 6:15 a.m., Officer Adams notified medical staff that Shepherd was again bleeding from his nose. Physician Assistant Cannon and Nurse Steven Phillips responded by coming to Shepherd's cell. Shepherd's nose was packed with a nasal pack, with directions that the pack be kept in place for 24 hours. Officer Adams did not participate in the packing of Shepherd's nose by medical staff. At about 6:48 a.m., Shepherd requested to use the toilet and get a drink. Nurse Steve Phillips returned and Officer Adams released Shepherd from four-points. Nurse Phillips checked Shepherd's restraints once he was again placed in four-points.

Officer Adams continued with ten minute observations on Shepherd until approximately 7:03 a.m. During his observations, Officer Adams did not see Shepherd bleeding. Officer Adams, however, did observe Shepherd turned on his side trying to throw up. Upon notifying Physician Assistant Cannon, Officer Adams was instructed to put something on the floor.

Officer Dale Cornatzer came on duty at 7:00 a.m. to relieve Officer Adams. Officer Adams advised Officer Cornatzer of the events concerning Shepherd during the previous shift. Officer Cornatzer was also advised that Shepherd was on suicide precaution observation and was in four-point restraints. An in-cell check was conducted, and Officer Cornatzer observed that Shepherd's nose was not bleeding and that he was breathing. Officer Cornatzer conducted a suicide observation, observing only that Shepherd had turned his head.

Officer Ezell Smith, the Court Officer, went to Shepherd's cell at 8:20 a.m. to inform Shepherd of what he needed to do to prepare himself to go to court. Officer Smith looked in the cell and observed that Shepherd was lying on what appeared to be mattresses behind his head, in four-point restraints. When Officer Smith spoke to Shepherd, Shepherd shook his chains and appeared to behave in a disruptive manner. Officer Smith left and went about informing the rest of the inmates in the unit who were going to court. Officer Smith last saw Shepherd as he passed back through the unit at 8:30 a.m. Officer Smith never noticed any bleeding from Shepherd's nose.

At 8:45 a.m., Madge Swindler, RN, went to Shepherd's cell to check his restraints. At the time she came on duty that morning, Nurse Swindler had received a briefing on Shepherd from a medical personnel from the previous shift. When she arrived at Shepherd's cell, she noticed that his head and chest were elevated by a mattress folded under his head and shoulder area. Nurse Swindler did not observe any blood or vomit on Shepherd, although she noticed water on the floor. Nurse Swindler failed to get a response from Shepherd and felt a very faint, almost not palpable, radial pulse. She did not believe, however, that Shepherd was dead because of a lack of certain symptoms. Officer Cornatzer hit the emergency alarm and Nurse Swindler left to get medical equipment and oxygen. Emergency

treatment was started on Shepherd and the local emergency medical services (EMS) was notified.

Sergeant Ed Johnson also responded to the emergency alarm. He saw Shepherd lying on the bunk in four-point restraints with a mattress rolled up under his shoulders, his nose packed and taped. When he saw that Shepherd was not breathing, Sergeant Johnson also called EMS.

EMS arrived at the jail at 8:49 a.m. after receiving the call at 8:47 a.m. EMS subsequently transported Shepherd by ambulance to the hospital. The hospital notified the jail at 9:14 a.m. that Shepherd had died.

A post mortem examination was conducted on the same day. The examination revealed blood stained gauze packing inserted into the nostrils. The autopsy revealed no single anatomic cause of death. Because of evidence of blood in the bronchial tubes, however, the medical examiner's opinion was that Shepherd's death was attributed to aspiration of blood with a history of seizure disorder also being a medical condition considered as a cause of death. The medical examiner had been informed by the Coroner that Shepherd was secured by four-point restraints flat on his back. The examiner's opinion was that Shepherd, being restrained, was unable to clear the blood from his passages.

It has been the general practice of JCDC that it will not interfere with medical decisions of medical staff. Therefore, it has been the view of Jefferson County Corrections that it is the medical staff's determination as to when an inmate is restrained for medical reasons, and as to an inmate's treatment plan. Corrections staff may interact with the medical unit regarding treatment but relies upon the judgment of medical staff.

At the time of the incident, JCDC Post Order, Four-Point Restraints, provided that an inmate ordered to be

placed in four-point restraints by a supervisor, psychologist, or medical staff would be restrained on his back, on the bunk. There had been no incident previous to the Shepherd incident where an inmate had died after being four-pointed on his back.

Prior to the entry of summary judgment by the district court, there were lengthy discovery and pretrial periods granted by the Court with several trial dates postponed as a result. By Order entered May 25, 1993, the parties were given until July 15, 1993 to file amendments to the pleadings, and until September 30, 1993 to complete discovery. By Order entered December 1, 1993, a trial date was set and the deadlines were extended to allow motions for joinder of parties and amendments of pleadings until January 31, 1994, and for discovery completion by June 30, 1994. The jury trial was twice more rescheduled and, subsequent to the substitution of undersigned counsel as counsel for the Jefferson County defendants and the filing of Defendants' summary judgment motion, the pretrial compliances and trial date were again postponed by Order entered March 27, 1995. On November 9, 1995, the discovery deadline was again extended and the Defendants' summary judgment motion was remanded with leave to refile due to the extended deadlines. Finally, the discovery period was again extended to October 30, 1996.

By Memorandum Opinion and Order entered February 27, 1997, the district court granted Defendants' motion for summary judgment as to all of the Plaintiff's constitutional claims. The Court dismissed without prejudice the Plaintiff's state law claims. On June 3, 1997, the district court denied Plaintiff's motion for reconsideration. Plaintiff filed a Notice of Appeal on July 2, 1997. The United States Court of Appeals affirmed the judgment of the district court on October 29, 1998.

REASONS FOR DENYING THE WRIT

A Petition for Writ of Certiorari should be granted only when there are compelling reasons. Plaintiff has not presented any of the reasons traditionally associated with a Petition for Writ of Certiorari. Reasons traditionally associated with such petitions include, when a United States court of appeals has rendered a decision on an important matter in conflict with the decision of another United States court of appeals on the same matter, or when a United States court of appeals has decided a federal question in a way that conflicts with applicable decisions of the Supreme Court.

Plaintiff's petition is more in the nature of an appeal. All of the arguments were presented to the United States Court of Appeals for the Sixth Circuit. The Petition for Writ of Certiorari should be denied because the Sixth Circuit Court of Appeals has already reviewed Plaintiff's arguments.

Moreover, the Sixth Circuit properly affirmed the district court's judgment in favor of the Jefferson County Defendants. The district court properly read Plaintiff's Complaint as alleging only a denial of medical care claim, and properly determined that no use of force claim or assault and battery claim was alleged by Plaintiff. Plaintiff produced no evidence creating a genuine issue of *m*aterial fact as to whether jail officials, who placed inmate Stanley Shepherd in restraints and monitored him in accordance with instructions from medical staff, were deliberately indifferent to the inmate's medical needs. Further, Plaintiff produced no evidence by which to create a material issue of fact as to supervisory or municipal liability. A plaintiff, who has the burden of proof, must do more than point to matters that create only confusion and speculation, in order to defeat a summary judgment motion.

I. The Court of Appeals for the Sixth Circuit Properly Affirmed the Judgment of the District Court.

In order to state a claim under 42 U.S.C. Section 1983, a plaintiff must plead and prove that he has been deprived of a right secured by the Constitution or laws of the United States, and that the defendant deprived him of this right while acting under color of law. *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149 (1978). Moreover, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 246 (1986), *Celetex Corp.* v. *Catrett*, 477 U.S. 319, 106 S.Ct. 2548 (1986), *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986). Summary judgment should be entered "if the record as a whole could not lead a rational trier of fact to find in favor of the plaintiff." *Matsushita*, 106 S.Ct. at 1356.

Therefore, the Sixth Circuit, upon reviewing the district court's grant of summary judgment *de novo*, properly affirmed the summary judgment in this action, because there was insufficient evidence for a reasonable juror to find in favor of Plaintiff based on the quantity and quality of the evidence.

The Eight Amendment analysis is applicable to pretrial detainees, who are afforded rights equal to rights of convicted persons. *Danese* v. *Asman*, 875 F.2d 1239, 1243 (6th Cir. 1989), *Roberts* v. *City of Troy*, 773 F.2d 720, 723 (6th Cir. 1985). Only the unnecessary and wanton infliction of pain invokes the Eighth Amendment. *Wilson* v. *Seiter*, 501 U.S. 294, 111 S.Ct. 2321 (1991). Therefore, the deprivation the plaintiff alleges to have occurred must be

objectively, sufficiently serious. 111 S.Ct. at 2324. Further, a plaintiff must satisfy the subjective component by demonstrating that the officials possessed "a sufficiently culpable state of mind." *Id.* at 2323. In claims involving medical care, an inmate must demonstrate that the defendants were deliberately indifferent to his obvious, serious medical needs. *Estelle* v. *Gamble*, 429 U.S. 97, 97 S.Ct. 285 (1976). An official is deliberately indifferent when under a subjective standard, he "knows of and disregards an excessive risk to inmates' health or safety; . . . ." *Farmer* v. *Brennan*, 114 S.Ct. 1970, 1979 (1994). Neither inadvertence nor medical malpractice is sufficient to establish a constitutional violation. *Estelle*, 97 S.Ct. at 291. Therefore, Plaintiff must prove the defendants acted with subjective recklessness and that their conduct was unreasonable in light of a known risk to Shepherd's health. *Farmer* at 1978-1979.

Because the Eighth Amendment is concerned with the "unnecessary and wanton infliction of pain," the infliction of unnecessary suffering due to a denial of medical care is deemed inconsistent with contemporary standards of decency. *Byrd* v. *Wilson*, 701 F.2d 592, 594, n.1 (6th Cir. 1983). Importantly, however, "conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional" under the Eighth Amendment. *Preston* v. *Smith*, 750 F.2d 530, 535 (6th Cir. 1984).

In holding that deliberate indifference to serious medical needs of an inmate constitutes a violation of the Eighth Amendment, the Supreme Court stated that deliberate indifference "is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Estelle*, 97 S.Ct. 285, 290-291. An official who chooses to promptly summon medical assistance rather than to personally ren-

der medical aid does not violate the Constitution. *Rich* v. *City of Mayfield Heights*, 955 F.2d 1092 (6th Cir. 1992).

Therefore, an official's refusal to relay or his procrastination in relaying an inmate's request for medical attention for a serious medical need was held unconstitutional as intentional and wanton conduct. *Parrish* v. *Johnson*, 800 F.2d 600, 604-605 (6th Cir. 1986). The deliberate indifference to an inmate's serious medical needs by withholding medical care prescribed by a physician has been held as unconstitutional. *Johnson* v. *Hardin County, Kentucky*, 908 F.2d 1280 (6th Cir. 1990), *Boretti* v. *Wiscomb*, 930 F.2d 1150 (6th Cir. 1991). These decisions indicate that the conduct of correctional officers who interfere with medical treatment given by medical professionals may amount to deliberate indifference.

Plaintiff did not establish by evidence sufficient for a jury that jail officials were deliberately indifferent to Shepherd's serious medical needs. Applying the *Estelle* v. *Gamble* and *Farmer* v. *Brennan* standards, it is clear that the evidence of record supports no inference that these officers acted deliberately in disregard of an obvious need for medical attention. The four-pointing of Shepherd to the bunk was at the instruction of and with the knowledge of trained medical professionals. The record clearly establishes that the officers relied upon the presence and judgment of the medical staff. Any suggestion that these defendants should have second-guessed the judgment of medical staff is contrary to *Estelle* principles. Plaintiff did not establish that the conduct of these officials in following medical directives was unreasonable, or that these officials were aware of a known risk to Shepherd's health. *Farmer* at 1978-1979. The evidence further established that officers did monitor Shepherd's condition. The suicide observation form did not direct security staff to monitor Shepherd for possible seizures. Certainly, there is no evidence in the

record that the defendants were informed by medical staff that Shepherd could possibly aspirate on his blood from the nosebleed.

Medical staff was notified of medical problems Shepherd experienced. Officer Cornatzer was briefed on Shepherd's situation when he arrived on duty, conducted an in-cell check of Shepherd, and made observation checks every ten minutes. Officer Cornatzer took emergency measures upon recognizing that Shepherd was in danger.

There was no evidence that Officer Smith knowingly disregarded an obvious need for medical attention. First, there is no evidence that Officer Smith had even been made aware of Shepherd's medical problems during the night. *Farmer* at 1978-1979. Further, Officer Smith had not been monitoring Shepherd and therefore had no reason to suspect or detect any changes in Shepherd's condition. (*Id*). Officer Smith was not familiar with Shepherd's condition. Under the Eighth Amendment, Officer Smith was not required to undertake a screening of Shepherd to determine whether Shepherd might need medical attention. *Danese* v. *Asman*, 875 F.2d 1239, 1244 (6th Cir. 1989).

The evidence clearly does not support an inference that these Defendants knew of and disregarded an excessive risk to Shepherd's health or safety to satisfy the standard established in *Farmer* v. *Brennan*. Therefore, summary judgment was properly granted in their favor.

II. Plaintiff's Complaint Did Not Allege an Unconstitutional Use of Force Claim or an Assault and Battery Claim.

The Petition argues that a genuine issue of material fact existed as to whether an assault and battery was committed. In support, Plaintiff relied upon the deposition testimony of a medical examiner that the trauma to this

particular area of the nose was "51/49" percent caused by a blow because individuals "who are conscious and not otherwise handicapped tend to evade their fall."[2] The district court declined to consider Plaintiff's argument because no use of force allegation was made in the Complaint. The Sixth Circuit found that this determination by the district court was appropriate.

Plaintiff argues that a use of force claim was sufficiently raised in Paragraph 15 of the Complaint. Plaintiff cites only one sentence of this paragraph. Paragraph 15, in its entirety, alleges only a medical care claim and does not state a use of force or assault and battery claim:

> (15) The Defendants were grossly negligent and deliberately indifferent to the serious medical needs of the decedent. This gross neglect and deliberate indifference to the medical needs of the decedent caused the death of the decedent. The actions of the Defendants resulted also in the unnecessary and wanton infliction of pain upon Stanley Shepherd prior to his death.

Further, the Complaint alleged no facts in support of an assault and battery claim.

Alternatively, Plaintiff argues that leave to amend the complaint should have been granted to sufficiently allege physical abuse. The record, however, clearly indicates Plaintiff was given ample opportunity to amend her pleading.

The record indicates that several Pretrial Orders were entered with several deadlines given for amendment of pleadings. In addition, in November, 1995, the Court granted Defendants' motion in limine to preclude evidence of assault and battery, one ground asserted in support that this allegation was not contained in the Complaint.

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[2] There is no evidence, however, that inmate Shepherd was conscious when he fell off his bunk.

Plaintiff was given notice that Defendants did not acquiesce in this claim and had ample opportunity to amend the Complaint. Therefore, the district court properly ruled that it would not consider Plaintiff's argument there was a genuine issue of material fact as to whether inmate Shepherd was assaulted and battered.

III. There Is No Genuine Issue of Material Fact.

Plaintiff argues that a material issue of fact existed as to whether Defendants were deliberately indifferent to inmate Shepherd's serious medical needs. Plaintiff does not dispute the facts stated by the district court in evaluating the summary judgment motion. Rather, Plaintiff points to additional "evidence" which she argues creates a genuine issue of material fact. This evidence includes (1) dried vomitus found on Shepherd by EMS workers summoned to the jail, (2) hearsay statements supposedly made during the litigation by former defense counsel that Shepherd may have been restrained on his stomach; (3) evidence that Shepherd's back was no longer supported by a mattress by the time EMS arrived; (4) hearsay statements of inmates that they heard Shepherd rattling his restraints for a long period of time; and (5) evidence that Shepherd's paper gown was removed at the time EMS arrived on the scene. Defendants note that this last statement is incorrect. There was no evidence the gown had been removed; only that Shepherd was not wearing the paper gown when EMS arrived.

It has never been disputed, however, that Plaintiff was restrained on his back, especially for purposes of the summary judgment motion. Moreover, statements made by attorneys and hearsay statements should not be used to defeat a summary judgment motion. Finally, Plaintiff should not be able to defeat summary judgment by producing evidence which raises only speculation. Plaintiff's "evidence" does not address the issue in this case, of which

there is no genuine issue of material fact, of whether Defendants were deliberately indifferent to Shepherd's medical needs.

IV. Plaintiff Was Not Improperly Assigned the Burden of Proof.

Contrary to the statements made in the Petition on page 16, the district court did not agree there were disputed issues of material fact. The court found that Plaintiff did not set out evidence to defeat the summary judgment motion made by the defendants.

Plaintiff argues that to prove liability, Plaintiff was required to prove the existence of a "negative" and the evidence in support of this claim was necessarily within the sole control of the defendants, and not of the Plaintiff. Plaintiff therefore argues that the burden of proof was with the defendants who had control of all the evidence.

Plaintiff cites several Supreme Court decisions in support of his argument. *Campbell* v. *United States*, 365 U.S. 85, 81 S.Ct 421 (1961), however, concerned what course of proceedings should be taken before a trial court determines that a criminal defendant is not entitled to witness statements under the Federal Jencks Act. Under the Act, a criminal defendant is entitled to witness statements, upon motion, after the direct examination of a government witness. Under the Act, the government was not required to make these witness statements available prior to the direct examination, or even after the direct examination if documents did not fall within the Act. The existence and contents of documents were necessarily within the exclusive knowledge of the government. In *United States* v. *New York, New Haven and Hartford Railroad Co.*, 355 U.S. 252, 78 S.Ct 212 (1957), the Court addressed whether the government versus the railroad had the responsibility to determine the correctness of a bill for payment issued

pursuant to a federal statute. There, the Court engaged in statutory interpretation and a review of previous decisions to determine that the responsibility, or burden, rested with the entity having the information. Responsibilities between the government and railroads were also earlier addressed in *United States* v. *Denver and Rio Grande Railroad Co.*, 191 U.S. 84, 24 S.Ct 33 (1903). None of these Supreme Court decisions are applicable to Plaintiff's claim, which is brought pursuant to 42 U.S.C. §1983.

In a Section 1983 action, a plaintiff must plead and prove that he has been deprived of a right protected by the constitution of the United States. *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149 (1978). A Section 1983 plaintiff has this burden whether the claim is based on the existence of an unconstitutional municipal ordinance or law, or based on a policy claim that the municipality failed to adequately train its employees. *See Canton* v. *Harris*, 489 U.S. 378, 109 S.Ct 1197 (1989). Most if not all cases in which a plaintiff alleges municipality liability based on failure to train will require a plaintiff to prove a "negative" because a plaintiff must prove that specific deficiencies existed and that the deficiencies were the cause of the constitutional violation. Nevertheless, it is the plaintiff's responsibility to articulate and establish a theory of liability with evidence sufficient to be presented to the jury. Therefore, the District Court did not improperly assign the burden of proof to Plaintiff. Further, the Sixth Circuit properly affirmed the judgment.

V. Plaintiff Did Not Establish an Unconstitutional Policy or Custom Which Caused the Injuries.

It is well established that a governmental entity cannot be held liable in a §1983 action unless the plaintiff pleads and proves that the unconstitutional conduct complained of was the result of a municipal policy or custom. *Monell* v. *Department of Social Services*, 436 U.S. 658, 98

S.Ct. 2018 (1978). To satisfy the requirements of *Monell*, a Plaintiff must establish by evidence a "definitive" policy or custom which was the "moving force" behind the alleged unconstitutional conduct. *Id. Oklahoma City* v. *Tuttle*, 471 U.S. 808, 105 S.Ct. 2427 (1985). A governmental entity cannot be liable for acts of individual officers or agents absent a policy or custom causing the conduct. *Board of County Commissioners of Bryan County, Oklahoma* v. *Brown*, 117 S.Ct. 1382 (1997). *Hays* v. *Jefferson County*, 668 F.2d 869 (6th Cir. 1982).

Plaintiff produced no evidence of a municipal policy or custom which caused Shepherd's injury or death. The Jefferson County Department of Corrections' policy of four-pointing inmates in a supine position was not an unconstitutional policy because the policy was not implemented in deliberate indifference or knowing disregard of an excessive risk to inmate health or safety.[3]

Similarly, Plaintiff did not establish by evidence sufficient for a jury municipal liability under a failure to train theory. There is no evidence that a failure to train was the proximate cause of the death of inmate Shepherd. Further, there is no evidence that the training provided was so inadequate, with the need for more or different training so obvious, that the inadequacy was so likely to result in the violation of constitutional rights. *City of Canton* v. *Harris*, 109 S.Ct. 1197, 1205-1206 (1989). Although Plaintiff argues at length that proof of a single incident can establish municipal liability, Plaintiff cannot escape the responsibility of establishing by evidence proof of an unconstitutional policy that caused the violation. *Id.* Therefore, defendants were entitled to summary judgment on

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[3] Petitioner cites on page 14 of her brief JCDC Standard Operating Procedure §300.57. This SOP is not applicable because it was adopted on August 19, 1991, after Shepherd's death.

Plaintiff's municipal liability claim because Plaintiff did not produce sufficient evidence of a policy or custom resulting in the deprivation of Shepherd's constitutional right.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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